STATE OF MICHIGAN

SUPREME COURT OF MICHIGAN

TERRY E. THOMAS,
Plaintiff,

Supreme Court No. 126609

vs.

GRAND TRUNK WESTERN RAILROAD INC., a successor by assignment to GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,
Defendant.

Court of Appeals Case No. 244246
Lower Court: Wayne County
Lower Court Case No. 98-839019-NO
Lower Court Hon. John A. Murphy

GRAND TRUNK WESTERN RAILROAD, INC.,
Plaintiff/Appellee,
vs.

AUTO WAREHOUSING COMPANY,
Defendant/Appellant.

Lower Court: Wayne County
Lower Court Case No. 00-17068 CK
Lower Court Hon. John A. Murphy

126609
Reply

Durkin, McDonnell, Clifton Davis & O'Donnell
JOSEPH J. McDONNELL (P32056)
Attorney for Grand Trunk
645 Griswold, Suite 3253
Detroit, Michigan 48226
(313) 963-3033

Potter, DeAgostino, Campbell & O'Dea
STEVEN M. POTTER (P33344)
RICK J. PATTERSON (P55706)
Attorneys for Auto Warehousing
2701 Cambridge Court, Suite 223
Auburn Hills, Michigan 48326
(248) 377-1700

REPLY BRIEF IN SUPPORT OF DEFENDANT AUTO WAREHOUSING COMPANY'S APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

INDEX OF AUTHORITIES

A. Reply to Counter Statement of Facts

Contrary to Plaintiff's contention, Defendant does not claim that the total amount paid to Mr. Thomas was unreasonable. Defendant has maintained since Plaintiff reached its settlement with Mr. Thomas that Plaintiff's allocation of $625,000 out of a total of $725,000 settlement to an incident that caused less severe injuries was unreasonable and improper. Plaintiff also misrepresents the facilitator's role in allocating the settlement between the two incidents in an effort to legitimize its allocation of the settlement between the incidents by stating:

> At the facilitation/mediation, the Honorable Michael L. Stacey evaluated Mr. Thomas' two claims against Grand Trunk as having a total value of $725,000.00 with $100,000.00 being allocated to the first incident of December 29, 1997 (from which Mr. Thomas returned to work), and $625,000.00 was allocated to the January 11, 1998 incident, from which plaintiff [Mr. Thomas] was never able to return to work. Judge Stacey made a specific finding that the $625,000.00 was reasonable.

(Plaintiff's Brief, p. 2).

Nowhere in the facilitation settlement document does Judge Stacey specifically state that the allocation of $625,000.00 to the second incident was reasonable. Instead, there is a general statement that the settlement agreement is reasonable. Plaintiff extrapolates from this general statement to claim a specific finding regarding the reasonableness of the settlement allocation. The statement could also represent Judge Stacey's opinion that the total amount paid to settle both claims is reasonable. When deciding Plaintiff's motion for summary disposition the evidence must be viewed in a light most favorable to Defendant. Maiden v. Rozwood, 461 Mich. 109, 120; 597 NW2d 817 (1999). Given the vagueness of the statement relied on by Plaintiff and the fact that it is subject to more than one interpretation, the statement does not support Plaintiff's contention of a specific finding that the $625,000 settlement was reasonable because when viewed in light most favorable

to Defendant, the statement does not refer to or pertain to the allocation of the total settlement. More importantly, the statement relied on from the facilitation settlement document does not support the grant of summary disposition because it is not admissible evidence. Maiden sets forth that when presented with a motion under MCR 2.116(C)(10) the court should consider sworn testimony or other admissible evidence, "[t]he reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." Maiden at 824. The same would be true for Plaintiff when supporting its motion. The statement by Judge Stacey is a hearsay statement regarding an opinion that is inadmissible and cannot provide the basis for the grant of summary disposition. In addition, Judge Stacey was not appointed as a special fact finder in this matter and his opinion regarding the reasonableness of the settlement has no probative value and cannot supplant the determination of reasonableness by the trier of fact in this case. Contrasted with Plaintiff's reliance on inadmissible and irrelevant hearsay, Defendant has set forth the testimony of Mr. Thomas' treating physicians setting forth the procedures performed and the relative severity of the injuries suffered in the 1997 and 1999 incidents. This sworn testimony is proper evidence under MCR 2.116(C)(10) to respond to a motion for summary disposition and creates a question of fact that must be resolved by the trier of fact, not the facilitator or the Court of Appeals.

When discussing Mr. Thomas' 1997 injuries, Plaintiff asserts that Mr. Thomas did not have any restrictions when he returned to work in December 1998. Dr. Weiss' correspondence dated December 17, 1998 states that Mr. Thomas "appears to recognize his limitations" (Exhibit A). When questioned regarding this statement during his deposition, Dr. Weiss testified that his restrictions regarding not lifting greater than 25 pounds, no work involving the right shoulder above shoulder

height and no work with right shoulder involving physical exertion greater than 15 minutes were still in effect but they did not impact Mr. Thomas' ability to perform his job duties (Exhibit B, Deposition of Dr. Weiss, pp. 15-16). The implication from Plaintiff's argument is that Mr. Thomas returned to work in December 1998 after making a full recovery from his 1997 incident. The correspondence and testimony of Dr. Weiss refute such a claim. Further evidence that Mr. Thomas had not recovered from his 1997 injuries is the fact that Dr. Weiss wanted to re-evaluate Mr. Thomas is six weeks (Exhibit A). Dr. Weiss testified that the reason he scheduled a re-evaluation was because he had some question as to whether Mr. Thomas would be able to handle his duties as a railroad worker (Exhibit B, p. 15).

With regard to the injuries from Mr. Thomas' 1999 incident, Plaintiff claims that "Mr. Thomas also aggravated the prior injuries to his left knee and right shoulder from his December 1997 accident" (Plaintiff's Brief, p. 6). Plaintiff offers no support for this assertion and none exists. In fact, Plaintiff's assertion is contrary to Dr. Weiss' testimony that Mr. Thomas never claimed that he aggravated the 1997 injuries after the 1999 incident (Exhibit B, p. 25). Rather than viewing the medical testimony in a light most favorable to Defendant in accordance with the requirements of MCR 2.116(C)(10), Plaintiff ignores the testimony set forth by Defendant and argues that its selective reading of the testimony supports its claims. If conflicting evidence exists regarding the nature and severity of the injuries suffered by Mr. Thomas that conflict must be resolved by a trier of fact, not the Court of Appeals, and the Court of Appeals erred when it weighed conflicting evidence and resolved questions of fact.

B. Reply to the Elements of Grand Trunk's Indemnity Claim.

Plaintiff sets forth a passage from Trim v. Clark Equipment Company, 87 Mich. App. 270 (1978) regarding indemnity claims after settlement of an underlying claim and highlights certain language from the court's opinion. Specifically, Plaintiff highlights the statement that "the burden on the defendant who settles after a tender of defense to the contractual indemnitor is refused must not be too heavy." This statement refers to whether actual or potential liability must be shown, not to the reasonableness of the settlement and has no bearing on the issue now before this Court. Plaintiff also highlights the following language:

> The reasonableness of the settlement consists of two components, which are interrelated. A **fact finder** must look at the amount paid in settlement of the claim in light of the risk of exposure (emphasis added).

Even the passage relied on by Plaintiff sets forth that the determination of the reasonableness of a settlement must be made by a "fact finder" not the court. Plaintiff has essentially turned the rule from Trim on its head. It is not Defendant's burden to show that the settlement was unreasonable, rather, it is Plaintiff's burden to show that the settlement was reasonable. In this regard, Defendant has presented testimony from Mr. Thomas' doctors that indicates the settlement of $625,000 out of $725,000 for the 1999 injuries was unreasonable. This testimony creates a question of fact and any contrary evidence simply confirms that a question of fact exists that must be resolved by the trier of fact.

Plaintiff's misunderstanding of the court's role in deciding a motion under MCR 2.116(C)(10) is highlighted by its statement that "[t]o the extent Auto Warehousing was entitled o a judicial determination and analysis on the issue of reasonableness of the settlement, it received that determination and analysis in the Court of Appeals" (Plaintiff's Brief, p. 11). The problem with the

foregoing statement is that it suggests that it is proper for a court to weigh conflicting evidence and resolve factual issues. As set forth above, Trim states that "[a] fact finder must look at the amount paid in settlement of the claim in light of the risk of exposure," not that a court must make such an examination. By stepping into the shoes of the fact finder in this matter, the Court of Appeals acted beyond its authority and deprived the fact finder of its proper role in the resolution of this matter.

C. Reply to Reasonableness of $625,000 Settlement.

Plaintiff undertakes a lengthy discussion of the relaxed liability standard in a FELA action to support the reasonableness of the settlement. While such a discussion may be relevant to the issue of Plaintiff's potential liability, that issue is not before this Court. The sole issue before this Court relates to the allocation of the settlement between two incidents and the liability standard under FELA has no relevance to reasonableness of the allocation. In addition, both of Mr. Thomas' claims were brought under FELA so any relaxed liability under FELA would apply to both the 1997 and 1999 incidents. Plaintiff's discussion of liability standards under FELA is simply a red herring to distract this Court from the issue of whether or not it was reasonable to allocated $625,000 out of $725,000 to the 1999 incident.

Plaintiff next claims that the settlement and allocation was reasonable because a defendant takes a plaintiff as it finds him and an employee is entitled to recover for aggravation of prior injuries under FELA (Plaintiff's Brief, p. 15). The problem with Plaintiff's argument is that there is no testimony to support the claim that Mr. Thomas aggravated pre-existing injuries as a result of the 1999 incident. Dr. Weiss testified that Mr. Thomas never claimed he aggravated his 1997 injuries as a result of the 1999 incident (Exhibit B, p. 25). Without any evidence linking Mr. Thomas' 1997

more serious injuries to his right shoulder and left knee to the 1999 incident, there is no basis to support the allocation of $625,000 out of $725,000 to the 1999 incident.

In an effort to misdirect the Court from the issue to be decided, Plaintiff focuses on the potential recovery by Mr. Thomas for both his 1997 and 1999 injuries and claims that $625,000 was reasonable. Defendant does not contest that the total settlement of $725,000 was reasonable in light of the injuries suffered by Mr. Thomas in 1997 and 1999. Defendant's position has consistently been that while the total amount paid by Plaintiff to resolve Mr. Thomas' claims was reasonable, it was unreasonable for Plaintiff to arbitrarily allocate over 85% of the settlement to the claim that involved less severe injuries. In support of its position, Defendant has presented medical evidence from Mr. Thomas' treating physicians setting forth that the injuries to his right shoulder and left knee in 1997 were more severe and required more surgeries than the injuries to his left shoulder and right knee in 1999. As set forth in Justice Wilder's Opinion in this matter, the medical evidence presented by Defendant creates an issue of fact regarding the reasonableness of the allocation of the settlement that must be decided by the trier of fact, not the Court of Appeals or this Court.

Plaintiff contends that "[t]o accept Auto Warehousing's position in this case would mean that an indemnitee could never settle an underlying claim short of verdict without the agreement of the indemnitor" (Plaintiff's Brief, p. 18). There is simply no basis for such a claim. This case is atypical because it involves the settlement of two unrelated claims with distinct injuries at the same time. As a result of this atypical situation, the issue is not whether the total amount paid for settlement was reasonable as it will be in the vast majority of cases. Instead, the issue concerns the allocation of a global settlement for distinct injuries with over 85% of the settlement being allocated to the claim

that involves indemnity despite the fact that the medical testimony reveals the injuries for the claim with indemnity are less severe than the claim that was allocated less than 15% of the settlement.

Plaintiff's assertion that there is no evidence of bad faith in this matter is erroneous. The allocation of the $725,000 in light of the nature of the injuries suffered by Mr. Thomas is itself evidence of bad faith. Bad faith is defined in Black's Law Dictionary (6th ed.), p. 139 as:

> The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.

In addition, Black's Law Dictionary (6th ed.), p. 693, defines "good faith," in part, as "an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage." The allocation of over 85% of the total settlement to the 1999 incident that involved less severe injuries demonstrates a design to gain an unconscionable advantage prompted by a sinister motive. The unconscionable advantage or sinister motive in this case is to allocate over 85% of the settlement proceeds to a claim where Plaintiff could seek indemnity despite the fact that the injuries related to that claim are less severe than the claim that was allocated less than 15% of the settlement proceeds. By allocating a disproportionate amount of the total settlement to the 1999 incident that involved an indemnity claim, Plaintiff sought to gain an unconscionable advantage by having Defendant bear the financial burden of the settlement. Plaintiff's attempt to avoid the financial obligation to resolve Mr. Thomas' claims impacts the reasonableness of the allocation of the settlement proceeds. Plaintiff's reliance on Admiral Insurance Co. v. Columbia Ins. Co., 194 Mich. App. 300, 486 NW2d 351 (1992), is misplaced because that case did not involve the allocation of a settlement between two claims. The issue here relates to the allocation of the $725,000. The fact

that Plaintiff had a motive to allocate over 85% of the settlement proceeds to the 1999 incident so that it could seek indemnity from Defendant for that higher amount impacts the reasonableness of the settlement and a trier of fact should be allowed to determine the reasonableness of allocating $625,000 to the 1999 incident after it has been presented with the medical evidence in this matter.

WHEREFORE, Defendant Auto Warehousing Company requests that this Court reverse the Court of Appeals' Opinion finding no triable issue of fact regarding the reasonableness of the allocation of the settlement by Plaintiff Grand Trunk Western Railroad, Inc., and remand the issue regarding the reasonableness of the settlement to the Wayne County Circuit Court for trial on that issue.

Respectfully submitted,

POTTER, DeAGOSTINO, CAMPBELL & O'DEA

STEVEN M. POTTER (P33344)
RICK J. PATTERSON (P55706)
Attorneys for Auto Warehousing Company
2701 Cambridge Court, Suite 223
Auburn Hills, Michigan 48326
(248) 377-1700

Dated: September 13, 2004